No. 87-1350

IN THE

Supreme Court of the United States

October Term, 1987

O.N.E. SHIPPING LTD.,

Petitioner,

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ANDINO CHEMICAL SHIPPING, INC., and MARITIMA TRANSLIGRA, S.A.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement Pursuant to Rule 28.1

Respondents have no parent, subsidiary or affiliate whose securities are publicly traded.

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Proceedings Below

On May 22, 1986, the District Court for the Southern District of New York (Duffy, J.) dismissed this private antitrust action of petitioner O.N.E. Shipping Ltd. ("O.N.E.") on the basis of principles of international comity. The District Court concluded that the Colombian government's compelling interest in the welfare of its national flag line, respondent Flota Mercante Grancolombiana, S.A. ("Flota"), and its interest in implementing its

cargo reservation laws in order to promote economic development in Colombia, far outweighed any potential United States interests furthered by this private antitrust suit between foreign parties.

On October 1, 1987, the Court of Appeals for the Second Circuit affirmed dismissal on the grounds of comity. 830 F.2d 449. The Court emphasized that the suit was a frontal attack on a Colombian statute, and it gave particular emphasis to "act of state" considerations in its comity analysis. The Court found that O.N.E.'s antitrust claims were premised on the contention that O.N.E. had been harmed by official acts of the Colombian government, and that those claims could not be resolved without probing and passing judgment on the conduct and motivations of a foreign sovereign. The Court concluded that the District Court was "clearly correct" in dismissing O.N.E.'s antitrust suit.

Statement of Facts

A. Introduction

The parties to this action are all foreign corporations that compete in the export of liquid bulk cargo from the United States Gulf Coast to the Atlantic and Pacific Coasts of Colombia.* As the Court of Appeals stressed, "O.N.E.'s antitrust suit represents a direct challenge to Colombia's cargo reservation laws and to the legality of appellees' space chartering agreements under those laws." 830 F.2d at 451.

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* Petitioner O.N.E. is a Bermuda corporation. Respondents Flota, Andino Chemical Shipping, Inc. ("Andino") and Maritima Transligra, S.A. ("Transligra") are Colombian, Panamanian and Ecuadorian corporations, respectively.

B. Colombia's Cargo Reservation Laws

Colombia's cargo reservation laws "were designed to promote the development of a strong Colombian merchant marine and to assist Colombia's economic development." *O.N.E. Shipping*, 830 F.2d at 451. During the period at issue in this case, the laws required that the first 50 percent of each licensed shipment imported into Colombia on trade routes served by Colombian carriers be transported on Colombian-owned vessels, or on non-Colombian vessels chartered by a Colombian company. The non-reserved 50 percent could be transported by any carrier of any country. United States flag ships enjoyed a preferred "associate" status under the cargo reservation laws and were free to carry liquid bulk cargo to Colombia without regard to any percentage requirement.

The cargo reservation laws also established a complex administrative mechanism to: (1) monitor the quality of ocean transportation services available to Colombian importers; (2) ensure that the resources of Colombian shipping companies were well employed; and (3) grant requests for waivers of the cargo reservation laws when Colombian-flag or Colombian-associated vessels were unable to accommodate the traffic on a route they had been authorized to serve.

C. The Critical Importance to Colombia of Flota and Its Participation in the Liquid Bulk Cargo Import Trade

Flota, a Colombian corporation and the national flag line, was formed in 1946 with funds provided, in large part, by the National Coffee Fund ("the Fund"). The Fund was established by the Colombian government to assist in

the growth and development of the Colombian coffee industry and to promote public works, such as the construction of roads, schools and hospitals, in Colombia's coffee growing regions. The Fund is administered by the National Federation of Coffee Growers, which today holds 74.3 percent of Flota's stock in a quasi-public capacity as administrator of the National Coffee Fund. By law, profits from Flota's operations attributable to this stock must be returned to the Fund, the assets of which can be used only for public purposes.

In the early 1970's Colombia's industrial development was severely hindered by the lack of a reliable transporter of liquid bulk commodities. Flota, as the national line of Colombia, felt a special obligation to accommodate the needs of Colombian importers of liquid bulk cargo, but had neither the equipment nor the expertise necessary to operate parcel tankers. To meet Colombia's needs, Flota ultimately entered into space chartering contracts with respondents Andino and Transligra, foreign corporations that had the technical expertise and appropriate vessels to operate this specialized service.

These space chartering contracts, which O.N.E. contends violated United States antitrust laws, could not have been implemented without the advance permission and continuing supervision of the Colombian government. The resolution granting that approval specifically conditioned it on Flota's continued compliance with the requirements of the cargo reservation laws. Among other things, Flota was obligated to provide effective, regular, and continuous service in the liquid bulk trade between the United States and Colombia, including handling the smaller, less profit-

able shipments characteristic of the trade which were shunned by other carriers. Flota was also required to submit to the maritime authorities detailed reports of the service provided.

"The Colombian Government has repeatedly made known to the United States Department of State, as well as to the Federal Maritime Commission, its strong support for the cargo reservation laws and the chartering agreements thereunder among the appellees." *O.N.E. Shipping*, 830 F.2d at 451.

D. O.N.E.'s Remedies Before the Federal Maritime Commission

The focus of O.N.E.'s "factual" presentation to this Court is a summary of the various proceedings before the Federal Maritime Commission ("FMC") which preceded this lawsuit. O.N.E. ignores, however, the significance of its own petition under Section 19(1)(b) of the Merchant Marine Act of 1920, which O.N.E. filed with the FMC after beginning this lawsuit. That petition set forth essentially the same claims pleaded in this action. The relevant FMC regulation governing that proceeding stresses the resolution of such disputes through diplomatic channels.*

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* The pertinent regulation, 46 CFR 585.8, provides that:

> Upon the filing of a petition, or on its motion when there are indications that conditions unfavorable to shipping in the foreign trade of the United States may exist, the Commission will notify the Secretary of State that such conditions apparently exist, and may request [that the Secretary] seek resolution of the matter through diplomatic channels.

Following O.N.E.'s filing of its Section 19 petition and the FMC's issuance of a proposed rulemaking, there were intensive discussions between representatives of the United States and Colombia. These discussions resulted in a diplomatic resolution of the matter and O.N.E. withdrew its petition.

As the Court of Appeals explicitly recognized in affirming dismissal of O.N.E.'s suit, the mechanism O.N.E. invoked before the FMC is "one intended to preserve harmonious relations among nations while giving the injured party a possible remedy." 830 F.2d at 453. In these circumstances, "courts should avoid the unnecessary irritant of a private antitrust action." *Id.* at 454.

ARGUMENT

The Questions Presented By Petitioner Do Not Warrant Supreme Court Review

I. There Is No Conflict With This Court's Decisions

O.N.E. argues that dismissal of its antitrust suit is contrary to this Court's decisions in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) and *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927). That contention lacks merit.

1. The plaintiff in *Continental Ore*, a U.S. corporation, alleged that defendants had conspired to monopolize the United States vanadium industry. As part of this conspiracy, defendant Electro Met, a Canadian company acting under the control and direction of its U.S. parent (Union Carbide), precluded plaintiff from selling vanadium in Canada and divided plaintiff's former Canadian customers among defendants. Electro Met was in a position to effect the "Canadian component" of the conspiracy because, as part of Canada's wartime measures, it had been appointed the exclusive wartime agent for the purchase and allocation of vanadium for use in Canadian industries.

Apart from appointing Electro Met as the wartime vanadium purchasing agent, the Canadian government was not alleged to have played any role whatsoever in the elimination of plaintiff from the Canadian vanadium market, nor did plaintiff question the validity of Canada's wartime measures or any action undertaken by the Canadian government. *Id.* at 702 n.11 and 706. The Court in *Continental Ore* explicitly found that:

> [T]here is no indication that the [Canadian Metals] Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped.

Id. at 706.

Moreover, the Court found "nothing to indicate that [Canadian] law in any way compelled discriminatory purchasing." *Id.* at 707. Thus, unlike this case, there was no need for the district court to examine or pass judgment on the acts and motivations of the Canadian government in order to determine the causal connection between Continental's injury and defendants' alleged anticompetitive conduct. In these circumstances, the act-of-state doctrine is inapplicable.

An assertion of U.S. antitrust jurisdiction in *Continental Ore* was also supported by principles of international comity. In contrast to the significant legal and economic interests of Colombia and the minimal U.S. interests implicated in O.N.E.'s lawsuit, United States antitrust concerns far outweighed any potential Canadian interests in the *Continental Ore* case. All plaintiffs and defendants in *Continental Ore*, with the exception of one wholly-owned

Canadian subsidiary of a U.S. corporation, were United States corporations engaged in the mining, manufacturing and selling of vanadium products in the United States. The conspiracy was entered into, directed from, and, for the most part, implemented in the United States and had as its objective monopolization of the U.S. vanadium industry. In addition, as the Court expressly noted in *Continental Ore*, the sole Canadian defendant had never been served and therefore could not be held liable for damages.

2. *Sisal Sales* is equally factually distinct from this case. First, *Sisal Sales* was not a private antitrust suit but rather an action brought by the United States government to enjoin violations of the antitrust laws committed within the United States. All defendants, with the exception of one Mexican company, were U.S. corporations engaged in business within the United States. The alleged conspiracy was "entered into by the parties within the United States"; was "made effective by acts done therein"; and had as its objective monopolization of the United States sisal market. 274 U.S. at 276.

Although, as in *Continental Ore*, the *Sisal* conspirators derived assistance in implementing their scheme from a foreign government's legislation, that legislation was not the explicit or implicit gravamen of the complaint. The district court in *Sisal* was not required to pass judgment on the public acts of the Mexican government in order to determine the causal connection between the antitrust violations alleged and defendants' conduct. Moreover, the interests of the United States in asserting antitrust jurisdiction outweighed any Mexican legal or economic interests implicated in the lawsuit.

In sum, the analyses undertaken by the District Court and the Court of Appeals in dismissing O.N.E.'s lawsuit are entirely consonant with this Court's rationale in both *Continental Ore* and *Sisal Sales*.

3. The different outcome in this case is a result of strikingly different factual circumstances. As the Court of Appeals recognized, the act of state doctrine bars the type of inquiry that would be called for in this case to determine whether, as O.N.E. asserts, its alleged antitrust harm resulted from Flota's "manipulation" of the cargo reservation laws and its inducement of the Colombian government to help respondents achieve their anticompetitive objectives, or simply from the autonomous operation of the cargo reservation system.

O.N.E.'s allegations make clear that its antitrust suit is squarely premised on the claim that it was harmed by respondents' manipulation of, or complicity with, the Colombian Government. It has stated in the Court of Appeals, for example, that the cargo reservation laws were "implemented [by Colombia] under the manipulative guidance of Flota"; that "Flota's ability to manipulate the cargo reservation laws is enhanced by the fact that the Colombian Government has abdicated its 'oversight' responsibility to Flota"; and that Colombia's port authority confers with Flota in determining whether to issue permits to non-Colombian carriers. *See O.N.E. Shipping*, 830 F.2d at 452. Accordingly, an assertion of U.S. jurisdiction would violate the act-of-state principles enunciated by this Court—that is, the district court would be called upon to examine and pass judgment on the public acts of a foreign sovereign within its own territory.

II. There Is No Conflict Among The Circuits

O.N.E.'s contention that the decision of the Court of Appeals is contrary to the Third Circuit's decision in *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (2d Cir. 1979) is perplexingly wrong.* Indeed, the Court in *Mannington Mills* expressly endorsed comity interest balancing as an appropriate analytical framework for determining the advisability of asserting United States anti-trust jurisdiction when foreign interests are involved. *Id.* at 1294-98.

The "conflict" O.N.E. perceives with *Mannington Mills* appears to be premised on a fundamental misreading of that case. According to O.N.E., the decision of the Second Circuit runs afoul of *Mannington Mills* by placing an improper burden on O.N.E. "to show the absence of an act of state", rather than requiring respondents to "establish that the foreign decree was basic and fundamental to the anti-trust behavior. . . ." O.N.E.'s Pet. at 12, quoting *Mannington Mills*, 595 F.2d at 1293. The excerpt relied on by O.N.E. to support its argument is as follows:

> One asserting the defense [of act of state] must establish that the foreign decree was basic and fundamental to the alleged anti-trust behavior and more than merely peripheral to the overall illegal course of conduct.

Id.

In fact, contrary to O.N.E.'s bracketed insert, the quoted statement does *not* refer to the act of state doctrine, but occurs in an entirely separate discussion of the defense of "foreign compulsion," which the Court explicitly describes

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* The citation to *Mannington Mills* contained in O.N.E.'s petition is erroneous. The correct cite is as above.

as a "conceptually distinct" defense. 595 F.2d at 1293. O.N.E.'s alteration of the quote to suit its own purposes is misleading and plainly incorrect.

The Third Circuit's discussion of the act of state doctrine, on the other hand, is fully consistent with the Second Circuit's decision in this case. As stated in *Mannington Mills*:

> [T]he [act of state] doctrine requires American courts to reject private claims based on the contention that the damaging act of another nation violates either American or international law.

595 F.2d at 1292-93.

As the Court of Appeals concluded, O.N.E.'s allegations of antitrust harm are "premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on." 830 F.2d at 452. In such circumstances, the Third Circuit would support dismissal of O.N.E's antitrust claims.

III. Application Of The Act Of State Doctrine Does Not Depend Upon The Views Of The Executive Branch, Which In Any Event Has Been Silent In This Case

O.N.E.'s final ground for seeking Supreme Court review is the alleged insensitivity of the Court of Appeals to what O.N.E. characterizes as the "overt and explicit" opposition of the Executive Branch to application of the act of state doctrine in this case. O.N.E. asserts that the act of state doctrine is to be employed by courts "only at the request of the government", and that the Supreme Court has con-

sistently "followed the request of the United States Executive in determining whether or not to apply the doctrine." O.N.E.'s Pet. at 9. O.N.E. is wrong. As the Court of Appeals stated, "whether to invoke the act of state doctrine is ultimately and always a judicial question." 830 F.2d at 452.

Even if O.N.E.'s novel legal position were correct, the Executive Branch has never expressed to any court in this case its views regarding abstention on act of state grounds. It is fantasy for O.N.E. to infer Executive Branch opposition to application of the comity doctrine from Executive Branch silence in the courts below.

In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the Court confirmed that abstention on act of state grounds is a uniquely judicial determination premised on the relationships and differing competencies of the three branches of government. It found the act of state doctrine to be applicable despite the fact that the U.S. State Department had declared the Cuban decree at issue in *Sabbatino* to be "manifestly in violation of . . . international law," *id.* at 402, and had "nowhere alleged that adjudication of the validity of the Cuban decree . . . would embarrass our relations with Cuba or impede settlement on an international level." *Id.* at 463 (White, J., dissenting).

Conclusion

There is nothing in this case justifying further review. Accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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